New Hampshire
ATTORNEY-GENERAL

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Aug. 17

Mr. Donald Knowlton, Commissioner,
Insurance Department
State House Annex
Concord, New Hampshire

Dear Mr. Knowlton:

You have inquired:

1. Has the Insurance Commissioner the authority to adopt a new standard form of fire policy?

2. Does the New York form of policy contain provisions which conflict with chapter 326 of the Revised Laws, and if so, do these conflicts impose any obstacle to the adoption of the form?

3. In the event of the adoption of the New York form, is there any question as to whether or not the statute controls in the case of conflicting provisions in the form?

1. In reply to question 1, in my opinion the Insurance Commissioner has authority to adopt a new standard form of fire policy, c. 1, c. 326, R.L.; Fidelity etc. Company v. Emerson, 85 N.H. 291; Opinion of the Attorney General, February 16, 1945, provided, however, that such adoption does not impair any rights of the insured under the present New Hampshire standard form as ratified by the Legislature under chapter 326, Revised Laws:

> "In 1935 it was enacted that the insurance commissioner should provide a standard form of policy, and that all companies should conform to the regulations prescribed by him. Laws 1935, c. 93, s. 3. Acting under this authority, the commissioner prescribed the form since known as the "New Hampshire standard form of policy". Ins. Com. Rep., 1935, pp. 5, 73. Grave doubts arose as to the binding effect of the commissioner's action. A similar statute, passed by the same legislature, was held to be invalid as an attempted delegation of legislative power. In Re School Law Manual, 63 N.H. 574. In the

revision of 1891, all doubts were removed by the enactment that "the form of policy and insurance contract now in force in this state is continued until the insurance commissioner shall change it." P. S., c. 170, s. 1.' Franklin v. Insurance Co., 70 N.H. 251, 258. See also Salgenik v. Insurance Co., 80 N.H. 450, 453, 454. Section 1 of chapter 170 of the Public Statutes is now embodied in P. L., c. 276, ss. 1, 2. The insurance commissioner has made no change in the form of policy, and the provisions of the New Hampshire standard form have therefore all the force of legislative enactments." Fidelity etc. Co. v. Ireason, supra, 293.

2. Assuming that the conferring of power to change the form but not the substance of the New Hampshire standard form of fire insurance policy is not an improper delegation of legislative power in conflict with the Constitution of this state, in answer to question 2, the New York form of policy obviously contains provisions which fundamentally conflict with the present New Hampshire standard form and chapter 326, Revised Laws, so as to raise serious doubt as to whether the public good would be served by the adoption of the New York form in the exercise of your administrative discretion.

For example, section 4, chapter 326, Revised Laws, provides in part,

> "A policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, or unless the difference between the property as it was represented and the property as it really existed contributed to the loss; but the sum insured by the policy shall be taken to be such fractional part of the sum mentioned therein as the premium paid by the insured is of the premium which he ought to have paid, not exceeding in any event the value of his interest in the property."

Affirmatively, a policy shall be avoided by reason of any mistake or misrepresentation which has been intentionally and fraudulently made. In contradistinction to the New Hampshire law governing avoidance, the New York form of policy provides that the policy shall be void if the insured has "wilfully concealed or misrepresented any material fact or circumstance concerning this insurance. . ." This may constitute a distinction without a difference, but nevertheless would require a court test in this state to determine conclusively whether or not there would be a difference in the test of legal avoidance in the event that the New York form of policy was adopted. Cf. Canning v. Insurance Co., 87 N.H. 180, 184.

Section 6, chapter 326, Revised Laws, provides that a change in the property insured or in its use or occupation, or a breach of any of the terms of the policy, shall not effect a policy except while the change or breach continues; whereas the New York form of policy provides that in the absence of a provision in writing, the company shall not be liable for loss incurred, inter alia, while a described building is vacant or unoccupied beyond a period of sixty days.

Section 7, chapter 326, Revised Laws, provides that cancellation for the non-payment of premiums may be had upon ten days notice, while the New York form provides for five days notice.

Section 9, chapter 326, Revised Laws, provides that the insured shall give notice of loss or damage within thirty days; whereas the New York form provides that the insured shall give immediate notice of loss.

Section 10, chapter 326, Revised Laws, is in conflict with the New York form providing that loss shall be payable sixty days after proof of loss is received and ascertainment of the loss is made.

Similarly, section 14, chapter 326, Revised Laws, provides that companiesundertaking to rebuild or repair shall do so within twenty days after adjusting the loss; whereas the New York form provides that the companies shall repair, on giving reasonable notice of their intention, within thirty days after receipt of proof.

Section 16, chapter 326, Revised Laws, establishes a statute of limitations of six months after receipt of notice in writing that the insured is dissatisfied with his adjustment; whereas the New York form could theoretically extend the statute of limitations beyond the six months period.

The most drastic variance between the New York form and the New Hampshire standard form occurs in the valuation of a recoverable loss. Section 9, chapter 326, Revised Laws, provides that in case of the total destruction of an insured building, "the sum insured shall be taken to be the value of the insured's interest therein"; whereas under the New York form "the insurer does insure . . . to the

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extent of the actual cash value of the property at the time of the loss . . ." In the case of destruction of realty, the New York form purports to limit the insured's recovery to actual cash value; whereas, concentually, New Hampshire law undertakes to indemnify the insured to the extent of his insurable interest covered by the policy. New Hampshire is a valued policy state; whereas New York is an indemnity state. See 6 Appleman, Insurance Law and Practice, ss. 3827 and 3828; Redden v. Phenix Insurance Company, 92 A. 335, 77 N.H. 592.

2. In answer to your third question, in the event of a conflict between the New York form and the statute, it is my opinion that the statute would control. Gleason v. New Hampshire Fire Insurance Company, 73 N.H. 533, 536. Every policy stipulation in conflict with the statutory form is void. Franklin v. New Hampshire Fire Insurance Company, 70 N.H. 251, 47 A. 91; Dean v. Insurance Company, 88 N.H. 416, 417; 1 Couch, Cyclopedia of Insurance Law, section 72a. Until 1953, chapter 326, Revised Laws, was as a matter of law made a part of every contract of insurance to which it was applicable. At the 1953 session of the Legislature, the necessity of printing the entire chapter as part of every contract of insurance was eliminated, but the Legislature was scrupulous to insert a proviso that

> "no waiver of any part of it [c. 326, R.L.] shall be set up by the insurer and every stipulation in the contract in conflict with it shall be void." S. 1, c. 105, Laws of 1953.

The valued provisions of the New York standard form, as well as other conflicts between the New York form and the New Hampshire law, would therefore be void in legal effect.

It is also significant that under the New York form, lines 42 to 49, the extent of the application of insurance under the policy and of the contribution to be made by the company in case of loss not inconsistent with the provisions of the policy may be provided for in writing by agreement of the parties. Under this provision an infinite variety of arrangements in conflict with New Hampshire law, even though void, might be entered into, resulting in litigation to resolve the rights of insurer and insured. Under the New York form, a co-insurance clause, requiring the insured to maintain insurance to an amount equal to a specified percentage of the value of the insured property, under penalty of becoming co-insurer to the extent of such deficiency, is frequently added as a rider to the policy. While such rider would be valid in New York, it would be void in New Hampshire, even though upon its face such an agreement might be presumed to be valid by an assured.

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The New Hampshire Board of Fire Underwriters and the National Board have suggested the following language to resolve basic conflicts between the New Hampshire standard form and the New York form:

> "Any and all provisions of this policy which are in conflict with the provisions of chapter [illegible] of the Revised Laws of The State of New Hampshire are understood by this company to be inoperative and void unless such policy provisions are more favorable to the insured than those of said statute, in which event the company agrees to be bound thereby."

This suggested language is consistent with the declared policy of our [illegible] as interpreted by our court to resolve conflicts in favor of the insured. Conflicts, however, are bound to arise as to whether policy provisions are more favorable to the insured than those of [illegible] statute. Since the Insurance Commissioner is authorized to change the form of an insurance contract but is not authorized to change the legal rights and liabilities of either the insured or the insurer, [illegible], 70 N.H. 251, 253, adoption of a form containing provisions in substantial conflict with New Hampshire law would not seem to be a desirable exercise of the Insurance [illegible] power to change the form.

In [illegible], as a matter of law, you, as Insurance [illegible] the New York form of [illegible] the public good would be benefited [illegible] which purports to establish [illegible] in substantial conflict with the [illegible]. I recommend [illegible] the more conservative course of [illegible] before you abandon the New [illegible] policy, which has received sub- [illegible]. However, if, in [illegible], the need for a revision of the [illegible] as to require your imme- [illegible] that you hold a public hearing for the pre- [illegible] upon the question of whether [illegible] of the New York [illegible]. Regardless of your ulti- [illegible] will have the salutary effect [illegible] for establishing a future legislature course of [illegible].

Very truly yours,

John [illegible]
Deputy Attorney General

[illegible]